

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JERRY A. RUSSELL
Claimant

VS.

MCCORKENDALE CONSTRUCTION INC.
Respondent

AND

BUILDER'S ASSOC. SELF-INS. FUND
Insurance Carrier

Docket No. 262,650

ORDER

Claimant requested review of the October 20, 2004 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on April 12, 2005.

APPEARANCES

Robert E. Wonder of Kansas City, Missouri, appeared for the claimant. Wade A. Dorothy of Lenexa, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined the claimant suffered accidental injury arising out of and in the course of employment, but he failed to meet his burden of proof that he suffered permanent impairment as a result of the incident.

The claimant requests review of the nature and extent of disability. Claimant argues that Dr. Theodore Foster's testimony establishes he suffered permanent impairment, and that the testimony of his sister and a friend corroborate his assertion that after the incident he developed continuing problems with concentration, memory and depression.

Conversely, respondent argues that the lack of medical treatment after the incident supports Dr. Michael E. Ryan's opinion that claimant did not suffer impairment after the heat exposure incident. The respondent requests that the Board affirm the ALJ's Award.

The issue for Board to determine is whether claimant suffered permanent impairment as a result of the incident at work on August 11, 2000.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On August 11, 2000, the claimant was at work laying a sewer line in a trench. He testified that the heat index that day was 118 degrees. He started work at 7 o'clock that morning, at approximately 12 o'clock the claimant had his lunch of two barbecued chicken drumsticks, a salad, a quart of Gatorade and a quart of water. When claimant returned to work he began to feel nauseous and noted he was suddenly drenched with sweat.

A co-worker told claimant he needed to get out of the trench. Claimant climbed out of the trench and started vomiting. He testified that he did not remember much after that except what was told to him by co-workers, which was that they poured water on him and had then put him in his truck with the air conditioner running. Claimant later drove himself home.

When claimant got home at approximately 7:30 that evening, his girlfriend called the hospital and was told claimant should drink as much fluid as possible and to try eating bananas for the cramping in his arms and legs. Claimant went to see a doctor the following day and was provided medication for the cramping and told to continue drinking fluids. The claimant returned to the doctor on August 15, 2000, and was provided a release to return to light duty work which apparently also indicated claimant might need to change his line of work. The last time claimant returned for treatment for the heat exposure incident was September 19, 2000. At this time he was given a full release to return to work.

Claimant did not feel he could return to work for respondent and has not returned to any other employment. Claimant noted he was unable to find work because after he informs prospective employers that he suffered from a heat stroke no one will offer him a job.

Claimant's sister, Dana Sue Bethard, testified that before the incident claimant was alert, bright and had a good memory. She testified that after the incident the claimant was more quiet, and unable to stay focused or remember things. She further noted he complains of headaches and dizziness and that when he attempts to do anything outdoors when the temperature is hot he becomes lethargic, sweaty and sick. Ms. Bethard agreed that she did not have the expertise to determine whether claimant's complaints are related to depression and alcohol abuse, conditions for which claimant is apparently receiving treatment, or a heat problem.

Claimant's friend, Rex Connor, testified that claimant has memory problems and complains of headaches and dizziness, but Mr. Connor agreed that he was not around before the incident in 2000, and had just renewed his friendship with claimant within the last couple of years.

Claimant testified that he now experiences headaches and dizziness on a fairly frequent basis. He has short term memory problems and inability to concentrate. He stated that the heat will cause this condition to occur. He also noted that he had received treatment for depression and alcohol abuse.

At the request of his attorney, on August 19, 2002, the claimant was examined by Dr. Theodore Foster. After examining claimant Dr. Foster concluded claimant suffered a heat stroke or infarct of his brain as a result of the incident at work. He noted that he was familiar with the *AMA Guides* and based upon his examination of claimant, his experience and the history provided, claimant suffered a 75 percent permanent partial functional impairment to the whole person. Dr. Foster did not cite any portion of the *Guides* and instead based his rating upon his experience. He testified:

Q. Your rating was 75 percent; is that correct?

A. Yes.

Q. And that's to the level of the body as a whole?

A. Correct.

Q. I believe you stated that it was based on your experience, the history provided, and the findings you made on physical examination?

A. Yes.

Q. Did you specifically cite that rating to any table, chart or chapter of the *AMA guides*?

A. I did not do it. Just from my experience.¹

Dr. Foster examined claimant two years after the incident, did not review any of claimant's medical records and agreed it would be helpful for claimant to undergo an EEG or MRI in order to verify his diagnosis that claimant suffered a heat stroke or brain infarct. He also agreed cognitive testing was necessary to evaluate claimant's memory problems, but that he had not performed such testing.

At the request of the ALJ, the claimant was examined by Dr. Michael E. Ryan on April 16, 2003. Dr. Ryan, a board certified neurologist, noted claimant complained of memory disturbance, headaches, heat intolerance, neck pain and gait unsteadiness. After performing an examination of claimant which included some cognitive testing, Dr. Ryan concluded the neurological exam was normal. He further concluded that there was no evidence that claimant suffered any residual problems as a result of his heat exposure incident at work. Dr. Ryan noted that claimant's complaints would be consistent if contemporaneous with a heat stroke, but not after a several year time lapse.

Q. Doctor, I do have just a few questions for you here. The complaints that Mr. Russell has made, dizziness, headaches, neck pain, memory loss, are those type of symptoms that would be relatable to a heat stroke injury?

A. Well, usually, I mean, even under severe circumstances those kind of things turn up fairly quickly, so you might expect something like that, you know, on an acute basis and maybe for a short period of time afterwards, but to have those kind of complaints, you know, now four years after the fact and it was three years when I saw him, I would think would not be consistent with that unless he had been in a coma or, you know, in the ICU where he had had a really severe - - because people can get that sick with exposure to heat, so unless you had been under those circumstances, I would think not.²

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.³

After the incident at work the claimant received minimal medical treatment and was released to return to his regular work. The court ordered independent medical examiner

¹ Foster Depo. at 15.

² Ryan Depo. at 15-16.

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

determined claimant had no ratable impairment under the Fourth Edition of the *Guides*.⁴ Conversely, Dr. Foster's impairment rating was based upon his experience instead of the statutorily mandated edition of the *Guides*.⁵

The ALJ determined that Dr. Ryan's testimony stating claimant suffered no permanent impairment as a result of the incident at work on August 11, 2000 was persuasive. The Board agrees and affirms the determination that claimant failed to meet his burden of proof that he suffered any permanent impairment as a result of the heat related incident at work on August 11, 2000. Moreover, the Board finds claimant has not met his burden of proof to establish that he has permanent work restrictions due to the incident or that he suffered a work disability.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated October 20, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert E. Wonder, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁵ See K.S.A. 44-510e(a).